

## **REMARKS**

Claims 3, 6-12, 15, 17, 19-21, 23, 24, 27-33, 63, 64, 66-71, 73-76, 78-80, 82-85, 87 and 89 were rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 6,224,631 to Kohrs, and claims 2, 8-12, 17, 18, 24, 28-32, 34, 63-71, 73-85 and 87-90 were rejected as being anticipated by U.S. Patent No. 6,099,531 to Bonutti. Additionally, claims 8-15, 19-23, 63, 66 and 69-71 have been rejected as being anticipated by U.S. Patent No. 6,375,683 to Crozet et al., and claims 8-12, 23, 24, 27, 63 and 67-71 have been rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent Application Publication No. 2002/0107519 to Dixon et al.

It is well established that “an invention is anticipated if the same device, including all the claim limitations, is shown in a single prior art reference. Every element of the claimed invention must be literally present, arranged as in the claim.” Richardson v. Suzuki Motor Co. Ltd., 9 USPQ.2d 1913, 1920 (Fed. Cir. 1989).

### **Claim Amendments**

The Applicant notes that independent claims 17, 73, 82 and 87 and dependent claims 9, 34, 64, 79, 83-85 and 88 have been cancelled without prejudice for possible submission in a continuing application. Additionally, dependent claims 27, 33, 76 and 80 have been rewritten in independent form, and claims 3-6, 15, 18, 28-30, 32, 63, 65, 70, 71, 74, 75, 77, 78, 81 and 89 have been amended to improve their form and/or to change their claim dependencies. New dependent claims 91-97 have been added. The subject matter recited in the new dependent claims 91-97 is based on various as-filed dependent claims, and are therefore properly supported and do not constitute new subject matter.

### **The Crozet and Dixon References**

The Applicant notes that independent claim 63 is the only pending independent claim that has been rejected based on Crozet and Dixon. The Applicant further notes that neither Crozet nor Dixon has been asserted against dependent claim 64. The Applicant has incorporated the subject matter of claim 64 into independent claim 63, and has cancelled claim 64. Accordingly, the claim rejections based on Crozet and Dixon are moot, and withdraw of these claim rejections is respectfully requested.

### **The Kohrs and Bonutti References**

Dependent claim 27 was solely rejected as being anticipated by Kohrs. (The Applicant notes that page 9 of the Office Action lists dependent claim 27 as being rejected by Dixon. However, this appears to be in error since independent base claim 87 was not rejected based on Dixon). As indicated above, claim 27 has been rewritten in independent form and recites, among other elements and features, that “said device has a substantially rectangular transverse cross section”. Notably, pages 3 and 4 of the Office Action do not set forth any grounds whatsoever as to how Kohrs could be construed to satisfy this claimed feature. Accordingly, the Office Action fails to set forth a *prima facie* case of anticipation with regard to dependent claim 27, which has now been rewritten in independent form. Furthermore, the implant 10 of Kohrs clearly has a circular transverse cross to facilitate threaded insertion of the implant 10 into the intervertebral disc space, as taught through the Kohrs specification. Accordingly, Kohrs clearly does not anticipate rewritten independent claim 27.

For at least these reasons, the Applicant respectfully requests withdrawal of the rejection of claim 27 and allowance of the same. Claims 28-31 depend from rewritten independent claim 27, and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 27.

Dependent claim 33 was solely rejected as being anticipated by Kohrs. As indicated above, claim 33 has been rewritten in independent form and recites, among other elements and features, “said device extending along a longitudinal axis and having a parallelepiped configuration”. Notably, pages 3 and 4 of the Office Action do not set forth any grounds whatsoever as to how Kohrs could be construed to satisfy this claimed feature. Accordingly, the Office Action fails to set forth a *prima facie* case of anticipation with regard to dependent claim 33, which has now been rewritten in independent form. Furthermore, the implant 10 of Kohrs has a circular or cylindrical configuration to facilitate threaded insertion of the implant 10 into the intervertebral disc space. The Applicant notes that the term “parallelepiped” is defined as a “6-faced polyhedron all of whose faces are parallelograms lying in pairs of parallel planes” (emphasis added). Webster’s Ninth New Collegiate Dictionary (© 1985). The Applicant submits that the implant 10 of Kohrs clearly does not in any way have a parallelepiped configuration. Accordingly, Kohrs does not anticipate rewritten independent claim 33.

For at least these reasons, the Applicant respectfully requests withdrawal of the rejection of claim 33 and allowance of the same. Claim 97 depends from rewritten independent claim 27, and is submitted to be patentable for at least the reasons supporting the patentability of independent base claim 33. Additionally, claim 97 recites that “said intervertebral fusion device is rotatably coupled with said elongate member”. As will be discussed below with regard to independent claims 63, 76 and 80, this feature is neither disclosed nor suggested by Kohrs or Bonutti.

Dependent claim 76 was rejected as being anticipated by Kohrs and Bonutti. As indicated above, claim 76 has been rewritten in independent form and recites, among other elements and features, that “said spinal implant is rotatably coupled with said elongate member to allow selective rotation of said spinal implant relative to said elongate member about said longitudinal axis to align said second transverse dimension along said select height of the intervertebral space”. Notably, pages 3 and 4 of the Office Action do not set forth any grounds as to how the implant 10 of Kohrs could be construed as being “rotatably coupled” with the insertion tool 500 (which has been construed as the elongate member). Similarly, pages 5 and 6 of the Office Action do not set forth any grounds as to how the wedge 44 of Bonutti could be construed as being “rotatably coupled” with the mounting tabs 144 and 146 (which have been construed as the elongate member). Accordingly, the Office Action fails to set forth a *prima facie* case of anticipation with regard to dependent claim 76, which has now been rewritten in independent form.

Furthermore, the Applicant notes that the insertion tool 500 of Kohrs includes grip portions 522, 523 that are engaged within the channels 24a, 24b of the implant 10 to securely and non-rotatably engage the insertion tool 500 to the implant 10 so that the implant 10 may be rotatably driven into the intervertebral disc space. Indeed, engagement of the grip portions 522, 523 within the channels 24a, 24b of the implant 10 actually prevents rotation of the implant 10 relative to the tool 500 so that the implant 10 may be rotatably driven into the intervertebral disc space. (See Figure 20). Accordingly, the implant 10 is clearly not “rotatably coupled” with the insertion tool 500 to allow selective rotation of the implant 10 relative to the tool 500. With regard to Bonutti, Figure 16 clearly illustrates and the specification explicitly teaches that the “mounting tabs 144 and 146 (Figure 16) are integrally formed with the wedge member 44d”.

(Column 14, lines 46-47). As a result, the wedge member 44d is clearly not “rotatably coupled” with the mounting tabs 144 and 146 to allow selective rotation of the wedge member 44d relative to the mounting tabs 144 and 146. Accordingly, neither Kohrs nor Bonutti anticipates rewritten independent claim 76.

For at least these reasons, the Applicant respectfully requests withdrawal of the rejection of claim 76 and allowance of the same. Claims 3-7, 74, 75, 77 and 95 depend from rewritten independent claim 76, and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 76. Additionally, claims 6 and 95 each recite that “said spinal implant has a substantially rectangular cross transverse cross section”. As indicated above with regard to independent claim 27, such feature is neither disclosed nor suggested by Kohrs or Bonutti.

Dependent claim 80 was rejected as being anticipated by Kohrs and Bonutti. As indicated above, claim 80 has been rewritten in independent form and recites, among other elements and features, that “said spinal implant is rotatably coupled with said elongate member and is rotatable relative to said elongate member”. Notably, pages 3 and 4 of the Office Action do not set forth any grounds as to how the implant 10 of Kohrs could be construed as being “rotatably coupled” with the insertion tool 500 (which has been construed as the elongate member). Similarly, pages 5 and 6 of the Office Action do not set forth any grounds as to how the wedge 44 of Bonutti could be construed as being “rotatably coupled” with the mounting tabs 144 and 146 (which have been construed as the elongate member). Accordingly, the Office Action fails to set forth a *prima facie* case of anticipation with regard to dependent claim 80, which has now been rewritten in independent form.

Furthermore, as indicated above with regard to rewritten independent claim 76, with regard to Kohrs, the grip portions 522, 523 of the tool 500 are engaged within the channels 24a, 24b of the implant 10 to securely and non-rotatably engage the insertion tool 500 to the implant 10. Indeed, engagement of the grip portions 522, 523 within the channels 24a, 24b actually prevents rotation of the implant 10 relative to the tool 500 so that the implant 10 may be rotatably driven into the intervertebral disc space. (See Figure 20). Accordingly, the implant 10 is clearly not “rotatably coupled” with the insertion tool 500. With regard to Bonutti, the mounting tabs 144 and 146 are integrally formed with the wedge member 44d. As a result, the

wedge member 44d is clearly not “rotatably coupled” with the mounting tabs 144 and 146. Accordingly, neither Kohrs nor Bonutti anticipates rewritten independent claim 80.

For at least these reasons, the Applicant respectfully requests withdrawal of the rejection of claim 80 and allowance of the same. Claims 18, 78, 81 and 96 depend from rewritten independent claim 80, and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 80. Additionally, claim 96 recites that “said spinal implant has a substantially rectangular cross transverse cross section”. As indicated above with regard to independent claim 27, such feature is neither disclosed nor suggested by Kohrs or Bonutti.

Independent claims 32 and 63 were rejected as being anticipated by Kohrs and Bonutti. The Applicant has amended independent claim 32 to recite, among other elements and features, that “said fusion cage is rotatably coupled with said elongate member to allow selective rotation of said spinal implant relative to said elongate member about said longitudinal axis”. Independent claim 63 has been similarly to recite, among other elements and features, that “said spinal implant is rotatably coupled with said elongate member to allow selective rotation of said spinal implant relative to said elongate member about said longitudinal axis”.

As indicated above with regard to rewritten independent claim 76, with regard to Kohrs, the grip portions 522, 523 of the tool 500 are engaged within the channels 24a, 24b of the implant 10 to securely and non-rotatably engage the insertion tool 500 to the implant 10. Indeed, engagement of the grip portions 522, 523 within the channels 24a, 24b actually prevents rotation of the implant 10 relative to the tool 500 so that the implant 10 may be rotatably driven into the intervertebral disc space. (See Figure 20). Accordingly, the implant 10 is clearly not “rotatably coupled” with the insertion tool 500. With regard to Bonutti, the mounting tabs 144 and 146 are integrally formed with the wedge member 44d. As a result, the wedge member 44d is clearly not “rotatably coupled” with the mounting tabs 144 and 146. Accordingly, neither Kohrs nor Bonutti anticipates independent claims 32 and 63, as amended.

For at least these reasons, the Applicant respectfully requests withdrawal of the rejection of independent claims 32 and 63 and allowance of the same. Claims 89-94 depend from independent claim 32, and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 32. Claims 8, 10-16, 19-24 and 65-71 depend from

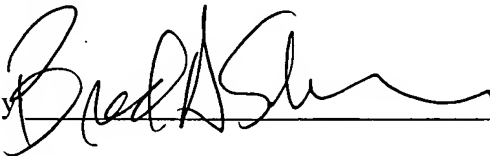
independent claim 63, and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 63. Additionally, claims 23, 71, 91 and 92 each recite that “said spinal implant has a substantially rectangular cross transverse cross section”. As indicated above with regard to independent claim 27, such feature is neither disclosed nor suggested by Kohrs or Bonutti.

## CONCLUSION

In view of the foregoing amendments and remarks, it is respectfully submitted that the Applicant's application is now in condition for allowance with pending claims 3-8, 10-16, 18-24, 27-33, 63, 65-71, 74-78, 80, 81 and 89-97.

Reconsideration of the subject application is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

Respectfully submitted,

By 

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